

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08

Date: 20 July 2010

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public

Redacted Decision on the prosecution's applications for redactions (ICC-01/05-01/08-772-Conf, ICC-01/05-01/08-778-Conf and ICC-01/05-01/08-786-Conf)

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

The Trial Chamber III of the International Criminal Court ("Chamber") in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case") delivers the following Decision on the applications made by the Office of the Prosecutor ("prosecution") for redactions to be applied to the statements of witnesses 209 and 213 pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence ("Rules").

I. Background and submissions

1. On 27 January 2010, the prosecution filed the "Prosecution's Second Request Pursuant to Regulation 35(2) of the Regulations of the Court" ("Second Application"), in which it indicated that the prosecution had secured some of the evidence previously identified in the original application for disclosure of additional evidence of 30 November 2009. Since the deadline for disclosing this evidence to the defence expired on 30 November 2009, the prosecution sought permission from the Chamber to disclose the statements to the defence and to add the witnesses to its trial list.¹
2. On 5 May 2010, the Chamber issued its Decision granting the prosecution's Second Application to disclose additional evidence, subject to certain conditions.²
3. On 10 May 2010, the prosecution submitted to the Chamber an application for redactions to be applied to the statements of witness 209. The prosecution requests leave to withhold certain information in the statements of this witness pursuant to the Rule 81(2) and the Rule 81(4) of the Rules.³ The relevant material was disclosed to the defence in redacted form on 10 May 2010.⁴

¹ Prosecution's Second Request Pursuant to Regulation 35(2) of the Regulations of the Court, 27 January 2010, ICC-01/05-01/08-673-Conf-Exp. A confidential redacted version was notified on 28 January 2010, ICC-01/05-01/08-673-Conf-Red.

² Decision on the prosecution's second application for disclosure of additional evidence, 5 May 2010, ICC-01/05-01/08-767-Conf-Exp. A Public redacted version was notified on 7 May 2010, ICC-01/05-01/08-767-Red2.

³ Prosecution's Application for Redactions pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence and in accordance with the Chamber's Order of 5 May 2010, 10 May 2010, ICC-01/05-01/08-772-

4. On 20 May 2010, the prosecution submitted an application to the Chamber for redactions to be applied to the statements of witness 213 pursuant to the Rule 81(2) and the Rule 81(4) of the Rules.⁵ The relevant material was disclosed to the defence in redacted form on 20 May 2010.⁶
5. On 26 May 2010, having liaised with the prosecution,⁷ the Chamber instructed the Registry to reclassify as confidential the two applications for redactions of 10 and 20 May 2010 in order to provide the defence with the necessary information as regards these applications.⁸
6. On the same day the defence was ordered by the Chamber to file its response, if any, to the prosecution's applications for redactions by 2 June 2010.⁹ None has been received.
7. On 7 June 2010, the prosecution submitted to the Chamber an application for redactions to the telephone numbers of, first, witness 213, pursuant to the Rule 81(4) of the Rules and, second, of an individual who is not a prosecution witness, but who might be at risk on account of his contact with the Court, pursuant to Article 54(3) (f) of the Rome Statute ("Statute") and Rule 81(4) of the Rules.¹⁰ The relevant document for which the redactions are sought, is a letter dated 9

Conf-Exp with confidential *ex parte* prosecution and VWU only annexes. Pursuant to the order of Trial Chamber III dated 26 May 2010, the main filing was re-classified as confidential – prosecution, Victims and Witnesses Unit and defence only.

⁴ Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 10 May 2010, 10 May 2010, ICC-01/05-01/08-771 with confidential *ex parte* Prosecution and Defence only Annex A.

⁵ Prosecution's Application for Redactions pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence and in accordance with the Chamber's Order of 5 May 2010, 20 May 2010, ICC-01/05-01/08-778-Conf-Exp with confidential *ex parte* prosecution and VWU only annexes. Pursuant to the order of Trial Chamber III dated 26 May 2010, the main filing was re-classified as confidential – prosecution, Victims and Witnesses Unit and defence only.

⁶ Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 20 May 2010, 20 May 2010, ICC-01/05-01/08-777 with confidential *ex parte* prosecution and defence only Annex A.

⁷ Email exchange between a Legal Officer of Trial Chamber III and the prosecution on 24 and 26 May 2010.

⁸ The Annexes to the applications remained confidential *ex parte* prosecution and VWU only.

⁹ Email communication between a Legal Officer to Trial Chamber III and the defence on 26 May 2010.

¹⁰ Prosecution's Application for Redactions pursuant to Rule 81(4) of the Rules of Procedure and Evidence, 7 June 2010, ICC-01/05-01/08-786-Conf with confidential *ex parte* prosecution and VWU only Annexes.

November 2009 sent by the witness to the prosecution, which was disclosed in redacted form to the defence, at the latter's request, pursuant to Rule 77 of the Rules.¹¹

8. Pursuant to regulation 34 of the Regulations of the Court, the Chamber on 10 June 2010 abridged the time-limit for the defence response to this application to 15 June 2010.¹² The defence submitted its response on 11 June 2010.¹³

II. Applicable law and relevant decisions

9. In accordance with Article 21(1) of the Statute, the Chamber has considered the following provisions:

Article 54(3) (f) of the Statute

Duties and powers of the Prosecutor with respect to investigations

Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 64 of the Statute

Functions and powers of the Trial Chamber

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

- (e) Provide for the protection of the accused, witnesses and victims.

Article 68(1) of the Statute

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the

¹¹ Prosecution's Communication of Pre-Inspection Report for material Provided to the Defence pursuant to Rule 77 on 7 June 2010, 7 June 2010, ICC-01/05-01/08-787 with confidential *ex parte* prosecution and defence only Annex A.

¹² Email communication between the Legal Adviser to the Trial Division and the defence on 10 June 2010.

¹³ Réponse de la Défense à la requête de l'Accusation aux fins de procéder aux expurgations, 11 June 2010, ICC-01/05-01/08-794-Conf.

investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Rule 77

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 81 of the Rules

Restrictions on disclosure

2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex- parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

10. Trial Chamber I has previously set out its approach concerning Rule 81(1) as follows:

Rule 81(1) of the Rules explicitly excludes from disclosure the internal documents ("reports, memoranda or other internal documents") prepared by "a party, its assistants or representatives" in connection with the investigation or preparation of the case. It is of note that the ICTY Rules of Procedure and Evidence contain an almost identical provision: Rule 70(A). It would be unhelpful to attempt in the context of this decision to define the material covered by this provision, but it includes, inter alia, the legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of investigation. The Chamber further ensured that the relevant material was limited only to internal documents of the prosecution, and redactions were only authorised if the information was not of a kind that required disclosure under the Statute. It is to be stressed that the material covered by this provision can be entire documents or parts thereof. Furthermore, the Chamber ensured the

redactions did not change the substance of the relevant parts of the documents, and in each instance they remained intelligible and usable.¹⁴

11. The Appeal Chamber in the *Lubanga* case held that “three of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence [are]: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why [...] the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹⁵

III. Analysis and conclusions

12. The Chamber has reviewed the information provided by the prosecution and it has applied a case-by-case analysis of the circumstances relevant to the witnesses in question, focusing, *inter alia*, on the need to safeguard the rights of the accused.

Witness 209

13. Pursuant to Rule 81(4), the prosecution requests the redaction of the **exact address of the witness and members of his family** in 6 statements.¹⁶ It argues that revealing the home address of the witness and of his family compromises their safety. In the circumstances, the Chamber is of the view that the proposed redactions are necessary, [REDACTED]. Furthermore, this information is irrelevant to any known or live issue in the case; the proposed redactions do not hinder the defence ability to assess the Rule 77 information contained in the

¹⁴ Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information" of 5 December 2008, 9 April 2009, public redacted version, ICC-01/04-01/06-1924-Anx2, paragraph 31.

¹⁵ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 14 December 2006, ICC-01/04-01/06-773 OA 5, paragraph 21. See also Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraph 67.

¹⁶ CAR-OTP-0057-0066, CAR-OTP-0057-0080, CAR-OTP-0057-0096, CAR-OTP-0057-0107, CAR-OTP-0057-0128 and CAR-OTP-0057-0153.

statement; they are very limited and they do not render the document unintelligible or unusable; and no lesser measures appear to be feasible to ensure the continued safety and security of the witness's family members. If the defence wishes to meet this witness or undertake proper investigations, arrangements can be made via the Victims and Witnesses Unit without revealing their address or addresses. If, after consideration of all options, it is still suggested that it is necessary to reveal this information, a discrete application may be filed.¹⁷ In all of the circumstances, given the lack of identifiable prejudice to the defence, the suggested redactions are necessary and proportionate, and they are granted, pursuant to Article 64(6)(e) of the Statute and Rule 81(4) of the Rules.

14. Under Rule 81(2), the prosecution requests limited redactions to the **identities of ICC field-staff** in 6 documents, including¹⁸ the name and signature of the interpreter in each statement, the name of a staff member of the Public Information and Documentation Section ("PIDS"), named [REDACTED] and the name of a staff member of the OTP Field Operations Office ("FOO"), named [REDACTED] in the first statement only (dated 12 December 2009).¹⁹ It argues that the prosecution has a very limited pool of interpreters in the field and that disclosing their identities would endanger further investigations.

15. The prosecution has a limited pool of interpreters in the field and the identity of the interpreter, as revealed by his name and signature, may endanger future investigations. In addition, this information is irrelevant to any known or live issue in the case; the proposed redactions are very limited; and they do not render the document unintelligible or unusable. In all the circumstances, given the lack of identifiable prejudice to the defence, the suggested redactions to the

¹⁷ See the approach taken in "Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents", 7 July 2010, ICC-01/05-01/08-813-Conf-Exp, paragraphs 65 – 68 and Annex A.

¹⁸ ICC-01/05-01/08-772-Conf-Exp-Anx1-B1 (CAR-OTP-0057-0066), ICC-01/05-01/08-772-Conf-Exp-Anx1-B2 (CAR-OTP-0057-0080), ICC-01/05-01/08-772-Conf-Exp-Anx1-B3 (CAR-OTP-0057-0096), ICC-01/05-01/08-772-Conf-Exp-Anx1-B4 (CAR-OTP-0057-0107), ICC-01/05-01/08-772-Conf-Exp-Anx1-B5 (CAR-OTP-0057-0128) and ICC-01/05-01/08-772-Conf-Exp-Anx1-B6 (CAR-OTP-0057-0153).

¹⁹ ICC-01/05-01/08-772-Conf-Exp-Anx1-B1; CAR-OTP-0057-0066.

name and signature of the interpreter are necessary and proportionate, and they are granted pursuant to Rule 81(2) of the Rules.

16. In relation to the names of the individuals working at the PIDS and FOO, as well as any other ICC “contact person” in the field, the Chamber considers that this information is potentially relevant to the defence case in that, *inter alia*, it may enable the accused to understand the procedures and processes applied to, and the individuals involved in, securing evidence. The Chamber is not persuaded that disclosure of their identities to the defence of Mr Bemba will interfere with the prosecution’s ongoing and future investigations or with the PIDS’ mandate. The Chamber is of the view that less restrictive protective measures than those proposed are appropriate, and thus it orders disclosure of these individuals’ identities to the defence. The Chamber underlines that the PIDS staff form part of a neutral organ of the Court, providing services equally to all parties and participants in the case and that as such, the defence is entitled to know the identity of the individuals who serve as staff members of this Court. Therefore, the redactions sought as to the names [REDACTED] are refused. However, in order to protect the undoubtedly valuable work of the PIDS and the FOO in the field, as well as to ensure that ongoing and future investigations of the prosecution are not in any way hampered, the Chamber emphasises that this information is not be disseminated to the public (or any “third party”), especially in [REDACTED].

Witness 213

17. Under Rule 81(4), the prosecution requests leave to redact the **exact address of the witness and the current location of members of his family** [REDACTED], in 3 statements.²⁰ Indeed, it argues that revealing the address of the witness and that

²⁰ICC-01/05-01/08-778-Conf-Exp-AnxB-1 (CAR-OTP-0056-0315), ICC-01/05-01/08-778-Conf-Exp-AnxB-2 (CAR-OTP-0056-0348) and ICC-01/05-01/08-778-Conf-Exp-AnxB-3 (CAR-OTP-0056-0387).

of members of his family, [REDACTED], would place them in grave danger. In a subsequent application, the prosecution seeks a limited redaction for the telephone number of the witness 213, pursuant to Rule 81(4) of the Rules. While the witness's identity is known to the accused, the prosecution submits that revealing his telephone number could similarly place him in grave danger.²¹

18. The proposed redactions are necessary to ensure the safety of [REDACTED]. Furthermore, this information is irrelevant to any known or live issue in the case; the proposed redactions do not hinder the defence ability to assess the Rule 77 information contained in the statement; it does not render the material unintelligible or unusable; and no lesser measures appear to be feasible to ensure the continued safety and security of the witness and his family members. Furthermore, should the defence wish to contact this witness or undertake other proper investigations, arrangements can be made via the Victims and Witnesses Unit without revealing the above information. If, after consideration of all options, it is still suggested that it is necessary to reveal this information, a discrete application may be filed.²² In all of the circumstances, given the lack of identifiable prejudice to the defence, the suggested redactions are necessary and proportionate, and they are authorised pursuant to Article 64(6)(e) of the Statute and to Rule 81(4) of the Rules.

19. Under Rule 81(4) of the Rules, the prosecution also requests leave to redact the photograph of the witness in two documents annexed to the witness's statements,²³ as this disclosure may lead to his recognition and identification, thereby placing him in grave danger.

²¹ ICC-01/05-01/08-786-Conf; ICC-01/05-01/08-786-Conf-Exp-AnxB (CAR-OTP-0062-0094).

²² See the approach taken in "Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents", 7 July 2010, ICC-01/05-01/08-813-Conf-Exp, paragraphs 65 – 68 and Annex A.

²³ ICC-01/05-01/08-778-Conf-Exp-AnxC-1 (CAR-OTP-0056-0383) and ICC-01/05-01/08-778-Conf-Exp-AnxC-2 (CAR-OTP-0056-0384).

20. The name of witness 213 has been disclosed to the defence and as he was for several years [REDACTED], his identity and appearance are well-known to the accused.²⁴

21. Addressing the general issue of photographs of witnesses and others affected by the work of the Court, pursuant to Article 68(1), the Chamber is required to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.²⁵ Circulation of an individual's image, without his or her consent, depending on the circumstances, may constitute an unjustified infringement of the right to privacy or "private life".²⁶ The Chamber has taken into account the potential heightened security concerns that are associated with the circulation of an individual's image and whether disclosure of a photograph may infringe the right to privacy. However, given an accused is on trial, the Chamber will apply the following approach to disclosure of photographic images. The presumption is that all the materials disclosed by the prosecution, either as part of the evidence it intends to advance against the accused (Rule 76 of the Rules), or exculpatory evidence or "material" for defence preparation (Article 67(2) of the Statute or Rule 77 of the Rules), will be provided in their entirety. Anything falling within those categories can only be withheld – "redacted" – for good cause (*e.g.* substantive security concerns) if this step is not inimical to a fair trial.

22. The individual concerned should be consulted, whenever possible, prior to disclosure to ensure there are no unaddressed substantive issues, such as security risks which should be brought to the attention of the Chamber, and absent the latter, the presumption is that there will be full disclosure.

²⁴ ICC-01/05-01/08-778-Conf-Exp-AnxB-1 (CAR-OTP-0056-0315), pages 13 – 14 and pages 19 – 21.

²⁵ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paragraphs 55 – 56.

²⁶ ECHR, *Wolfgang SCHÜSSEL vs. Austria*, Third Section Decision as to the Admissibility of Application no. 42409/98, 21 February 2002, paragraph 2.

23. Accordingly these photographs are to be disclosed, unless following discussion with the witness, there are outstanding issues to be resolved by the Chamber.

24. Under Rule 81(2) of the Rules, the prosecution initially requested limited redactions in the first statement of witness 213²⁷ relating to the identity of a prosecution “resource person”, [REDACTED] (*viz.* someone who is not a prosecution witness). There is an inconsistency in the prosecution’s request as within the statement the name was highlighted in red, which is the colour used by the prosecution to seek redactions pursuant to Rule 81(4) of the Rules,²⁸ whilst in the application for redactions dated 7 June 2010,²⁹ the prosecution sought to withdraw its initial application for redactions relating to the identity of this “resource person”.³⁰ It argued that maintaining this request for redactions would be inconsistent because it had already disclosed his identity.³¹ Thus, in the application of 7 June 2010, the prosecution’s request for redactions does not concern the name of the resource person but it is instead limited to the proposed redaction of the telephone number of [REDACTED], and it is argued that this redaction is necessary to safeguard his personal security, since he may be at risk on account of his cooperation with the Court.

25. In its response to the prosecution’s application, the defence argues disclosure would enable the defence to prepare its case effectively, pursuant to Rule 77 of the Rules.³² Moreover, the defence requested the Chamber to order the prosecution to disclose all the information it possesses regarding this individual.³³

²⁷ ICC-01/05-01/08-778-Conf-Exp-AnxA, page 1.

²⁸ ICC-01/05-01/08-778-Conf-Exp-AnxB-1 (CAR-OTP-0056-0315).

²⁹ ICC-01/05-01/08-786-Conf-Exp-AnxB, page 2.

³⁰ ICC-01/05-01/08-786-Conf, paragraph 5.

³¹ The prosecution indicates in footnote 3 of its filing ICC-01/05-01/08-786-Conf that the redaction of the resource person’s name was requested in ICC-01/05-01/08-778-Conf. The relevant disclosure can be seen in ICC-01/05-01/08-777-Conf-Exp-AnxA.

³² ICC-01/05-01/08-794-Conf, paragraph 7.

³³ ICC-01/05-01/08-794-Conf, paragraph 8.

26. The defence is aware of this individual's identity, and his telephone number is irrelevant to any of the known issues in the case. Furthermore, the proposed redaction does not render the material unintelligible or unusable; and no lesser measures appear to be feasible to ensure the continued safety and security of this individual. If the defence needs to contact him, arrangements can be made by the Victims and Witnesses Unit. This redaction to the telephone number is to be maintained.

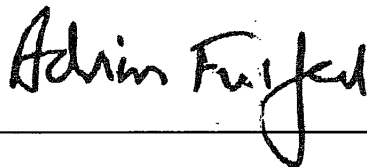
IV. Orders of the Chamber

27. On the basis of the analysis set out above, the Chamber hereby:

- a. Grants the redactions sought pursuant to Rule 81(4) of the Rules in respect of the statements of witness 209.
- b. Partially grants the redactions sought pursuant to Rule 81(2) of the Rules in respect of the statements of witness 209. The redactions which are permitted include redactions to the name and signature of the interpreter.
- c. Refuses the prosecution's request to redact information relating to the names of the individuals working at the PIDS and FOO, as well as any other ICC "contact person" in the field. The prosecution is to disclose the relevant statements of witness 209 with these redactions lifted.
- d. Partially grants the redactions sought pursuant to Rule 81(4) of the Rules in respect of the documents pertaining to witness 213. The redactions which are permitted include redactions to the exact address of the witness, the current location of members of his family, any reference [REDACTED] to the telephone number of the witness.

- e. Refuses the prosecution's request to impose redactions to photographs of witness 213 and orders that the approach to disclosure of photographic images set out in paragraphs 21 to 23 shall be followed by the parties and participants.
- f. Grants the redaction sought under Rule 81(2) of the Rules to the telephone number of a resource person in respect of the documents pertaining to witness 213.

Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 20 July 2010

At The Hague, The Netherlands